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IN THE

Supreme Court of the United States

October Term, 1967

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PRECISE IMPORTS CORPORATION, MITCHELL MOGAL, INC., and TOPLINE INDUSTRIES CORPORATION,

Petitioners,

against

JOSEPH P. KELLY, Collector of Customs of the Port of New York, IRVING FISHMAN, Deputy Collector of Customs, and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB W. FRIEDMAN,
Attorney for Petitioners.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now come Precise Imports Corporation, Mitchell Mogal, Inc., and Topline Industries Corporation, by their attorney, Jacob W. Friedman, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, which Court dismissed petitioners' action for a declaratory judgment and an injunction and awarded the United States of America on its counterclaim for liquidated damages sums aggregating $21,279.78 with interest.

Opinions Below

A copy of the opinion of the Court of Appeals, by Lumbard, Ch. *J.*, is hereto annexed. A copy of the opinion of the District Court (Croake, *D.J.*) is likewise annexed. Apparently neither opinion is reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1967. The jurisdiction of the United States District Court was invoked under 28 U. S. Code Sec. 1331, and the jurisdiction of the Supreme Court is invoked under 28 U. S. Code Sec. 1254.

Statutes Involved

15 U. S. Code Sec. 1241:

> "As used in this chapter—
>
> "(a) The term 'interstate commerce' means commerce between any State, Territory, possession of the United States, or the District of Columbia, and any place outside thereof.
>
> "(b) The term 'switchblade knife' means any knife having a blade which opens automatically—
>
> "(1) by hand pressure applied to a button or other device in the handle of the knife, or
>
> "(2) by operating of inertia, gravity, or both."

15 U. S. Code Sec. 1242:

> "Whoever knowingly introduces, or manufacfactures for introduction into interstate commerce, or transports or distributes in interstate commerce any switchblade knife, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

Statement of Proceedings

Briefly, the action was brought by plaintiffs, a group of importers, against the Collector of Customs with respect to seven shipments of knives imported by them and claimed by the defendants to violate the so-called Switchblade Knife Act (15 U. S. Code Sec. 1241). Plaintiffs sought a declaratory judgment to the effect that the knives involved herein were not forbidden by the statute; that the defendants (the United States of America was added as a defendant on its own motion) be enjoined from seizing or taking any action with regard to the knives and from collecting liquidated damages. The answer included a counterclaim of the Collector and Deputy Collector for such liquidated damages by reason of plaintiffs' alleged failure to redeliver the merchandise.

A crucial aspect of the proceedings is the fact that prior to the trial the parties had entered into the following stipulation (21a):

> "The knives involved in this action do not open automatically by button, inertia, gravity, or any combination of the foregoing upon arrival at the Port of New York."

Despite the foregoing stipulation, which should have been conclusive of the action, the trial Court, over objection and exception, received the testimony of one Joseph Lamb, a Bureau of Customs Representative familiar with switchblade knives (22a-23a), to the effect that he had taken one of the knives and worked on it with a file, an icepick, a pair of pliers and a hammer (27a-28a)—all with a view towards having it open "automatically." He made four or five attempts to open it in the presence of the Court and jury, all without success, and finally contrived to have it open (32a-34a). He said that his alteration of the knife took "approximately nine and one-half minutes" (28a). Of course, to achieve this result he had made substantial altera-

tions in the knife. Incidentally, the witness was a former football player (39a).

Although plaintiffs moved for a directed verdict, the Court submitted the issue to the jury (59a) of whether the knives placed in evidence came within the statutory definition of opening automatically in the manner stated (69a), and the verdict was in the affirmative (87a).

There ensued by the Court a trial of the counterclaim, which had been interposed on behalf of the Collector of Customs and his Deputy, the answer alleging on their behalf (19a):

> "12. No protest or other objection to the said demands referred to in the preceding paragraph of this counterclaim has ever been timely made by plaintiffs and the said amounts are now conclusively due and owing, pursuant to the provisions of Title 19, United States Code, Section 1514."

Then follows the demand for judgment. The statute, however, merely fixes a time for protest against the Collector's decisions and is silent on any liability on a bond. On the question of the failure to protest, this point was withdrawn expressly by the Government in the following language:

> "The refer nce to 19 U. S. C. Sec. 1514 in paragraph 12 of the counterclaim was to support the allegation that plaintiffs had lost their right to contest the claim for liquidated damages by their failure to file a protest under 19 U. S. C. Sec. 1514. This contention is not being pressed at this time."

In the face of the foregoing circumstances, to wit, the interposition of the counterclaim only by the Collector and his Deputy; no counterclaim by the United States: the withdrawal of the contention of no timely protest; the omission of the answer to refer to any bond whatsoever—the trial Court nevertheless granted judgment to the United States "based upon a breach of the bonds posted by plaintiffs" (128a).

Reasons for Granting Writ

The argument has consistently been made by petitioners below, and they reiterate it in this Court that the knives imported by them do not come within the condemnation of the statute; that this fact is established by explicit stipulation of all the parties; and that the ability of an individual by the use of various tools to alter the mechanical construction of an appliance may not be invoked to render criminal that which is essentially innocent. In full recognition that this Court is not the forum for the presentation of questions of fact, petitioners assert that the facts are undisputed and that in effect a construction has been placed upon the statute in a manner equivalent to legislative amendment rather than judicial construction. A grave injustice has resulted that is not merely a hardship to petitioners but is also a dangerous precedent with regard to future like questions.

Apart from the matters referred to in the statement of proceedings, a number of additional material errors have affected the legality of the proceedings. In view of the requirement of the rules that the questions presented for review be expressed without unnecessary detail, an attempt will be made to set forth these matters as concisely as is consistent with the necessities of the case.

ARGUMENT

QUESTION No. 1

Whether the three knives in evidence were identified as being part of the customs entries involved in the action.

At the outset, the record can be scanned in vain for any competent proof tying in the three knives received in evidence with any of the seven customs entries (8a-15a) upon which the suit was based. The only concession in this re-

gard was that two of the knives in their original condition had been imported by petitioner Mitchell Mogal, Inc. There is a complete absence of proof that the knives in evidence were similar to the knives involved in the suit, or that the same operation could be performed on the rest of them.

QUESTION No. 2

Whether despite a formal written stipulation that the knives involved are not such as are described in the pertinent statute, the fact that they are susceptible of substantial alteration by the use of tools may be invoked to bring them within the statutory condemnation.

It has already been pointed out that the parties stipulated expressly that the knives in question were not when imported within the statutory description. Notwithstanding the agreement, which manifestly should have concluded all controversy, the Government was allowed to proceed on the theory that the employment of divers tools could be utilized so as to change the character of the knives into instruments illegal and objectionable. The mere statement of such an outlandish proposition is shocking and offensive to all sense of justice. A Government witness was constrained to admit that a spoon with bowl removed could be used as a dagger; so could any knife; that the metal end of an umbrella could be made into a dagger; that any metal could be sharpened and used likewise (52a, 55a-56a). Asked whether a letter opener shown him could be used as a dagger with insignificant preparations, he promptly replied (55a), "No doubt about it." These matters being so obvious, it approaches absurdity to suggest that the most innocent appliance must be condemned merely because in evil hands it may be rendered dangerous or transformed into a weapon. Accordingly, it is submitted that it was gross error to submit the issue to the jury under the circumstances disclosed.

QUESTION No. 3

Whether exhibits may be received and a witness called without being identified in a pre-trial memorandum, in violation of a pre-trial order.

The pre-trial order, consented to by the attorneys, forbade the offering of any exhibit or the calling of any witness "unless identified in a pre-trial memorandum" (R.141-143). The Government did not even file a pre-trial memorandum, and clearly violated the terms of the order (45a), and a material witness (Louis A. Pinkussohn) was permitted to testify over objection and exception (44a-47a).

QUESTION No. 4

Whether the failure to charge as requested constituted prejudicial and reversible error.

The assertion of this point is not to be construed as a concession that the matter should have been submitted to the jury at all. However, if it be assumed that the case presented an issue for jury adjudication, the trial Court declined in a number of significant respects to instruct the jury as requested (74a-80a). Illustrative are the following: that there was no proof of any intent on the part of any one to use the knives in evidence for any purpose other than legal; that the statute does not prohibit the importation of stilettos or daggers; that the statute does not bar the importation of weapons; that the knives involved did not operate automatically; that there is no provision in the statute concerning alterations, significant or insignificant; that the utilitarian purpose of the knife is not a factor in the statute and is not mentioned therein; that in so far as knives not proved by the Government to be in violation of the statute, the verdict had to be for plaintiffs; that the Government's proof had to convince the jury beyond a reasonable doubt (appropriate in the light of the statute's serious criminal sanctions); as well as a number of others.

QUESTION No. 5

Whether a finding of illegality of three knives placed in evidence entitles defendants to judgment in the absence of similarity to the bulk involved in the action.

This point is not to be deemed an admission that the three knives placed in evidence by the Government were shown to be violative of the statute. Petitioners actually insist the contrary. Still, even on the assumption that such illegality was shown, no proof was adduced to indicate that the thousands of knives whose nature was the basis of the action were identical with or in any manner like the exhibits. Thus there was a failure of proof, and recourse must be had to the stipulation. The latter most certainly is applicable to the knives with respect to which the parties solemnly agreed as to their legality upon arrival at the port of New York. In such case (if the premise be accepted *arguendo* that three knives were found objectionable) petitioners were entitled to judgment as to the remainder of the shipments.

QUESTION No. 6

Whether the government was entitled to recover damages for a breach of bonds in an action wherein the counterclaim was based upon an entirely different theory and asserted on behalf of other parties.

As has been indicated above, the counterclaim was interposed on behalf of defendants Joseph P. Kelly (Collector of Customs) and Irving Fishman (Deputy Collector), and was expressly based upon 19 U. S. Code Sec. 1514, namely, a demand for liquidated damages for failure to redeliver merchandise upon demand without protest or other objection. With this counterclaim in the proceed-

ings, the United States Attorney not only withdrew any reliance upon the failure to protest, but also completely changed the counterclaim as follows: (1) making it a claim not on behalf of the Collector and Deputy Collector but on behalf of the Government; and (2) making it a claim for breach of bonds. Petitioners promptly challenged the procedure, urging that the counterclaim was not based upon any bond, but the objection was overruled (101a). It may be that the Government's withdrawal of reliance upon the absence of protest was predicated upon the circumstances that the objection to the knives was not grounded upon any customs law but rather upon a criminal statute, but this position did not entitle defendants to substitute a claim on bonds for the claim they had pleaded. One untenable sequel of the anomalous procedure followed by defendants was that a recovery has been had on the altered counterclaim without proof of any damages.

QUESTION No. 7

Whether a claim on the bond was maintainable upon the basis of a demand made prior to a finding of noncompliance.

Under the terms of the bond (Appellees' Appendix, 19-b) no liability could attach to either the principal or the surety unless and until there was a demand by the Collector for redelivery of all "merchandise found not to comply with the law". The plain meaning of the language is that the finding must precede the demand. Even if it be assumed that what the effect of the verdict was to establish noncompliance—which, of course, we dispute—then and only then could a demand be made that would be a basis for a claim on the bond. The earlier and only demand in advance of the finding was a nullity. Even the Court of Appeals noted what it termed an "ambiguity" in the bond. Under the foregoing circumstances the claim on the bond had to be dismissed.

We mention parenthetically that other aspects of the questions referred to were more fully treated in the Courts below. In the interest of brevity we refrain from developing these matters or from distinguishing the cases referred to in the opinion of the Court of Appeals, virtually all of them relating to peripheral phases of the case. The omission to discuss the foregoing herein must not be regarded as an abandonment.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.

Opinion of U. S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 348—September Term, 1966.

(Argued March 7, 1967 Decided June 15, 1967.)

Docket No. 30777

PRECISE IMPORTS CORPORATION, MITCHELL MOGAL, INC., and TOPLINE INDUSTRIES CORPORATION,

Plaintiffs-Appellants,

v.

JOSEPH P. KELLY, Collector of Customs of the Port of New York, IRVING FISHMAN, Deputy Collector of Customs, and UNITED STATES OF AMERICA,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and SMITH, *Circuit Judges.*

Appeal by plaintiffs from a judgment of the United States District Court for the Southern District of New York, Thomas F. Croake, *J.*, dismissing their action for a declaratory judgment and an injunction against enforcement of the Switchblade Knife Act, 72 Stat. 562 (1958), 15 U. S. C. §§ 1241-44, against knives imported by plaintiffs "and knives similar thereto," and awarding the United States, on its counterclaim for liquidated damages under entry bonds posted on release of the knives, $7,468.80

against plaintiff Precise Imports Corporation, $10,000 against plaintiff Mitchell Mogal, Inc., and $3,810.98 against plaintiff Topline Industries Corporation, plus interest.

Affirmed.

A. BERNARD KING, New York, N. Y. (Murray Rosof, New York, N. Y., on the brief), *for plaintiffs-appellants.*

DAVID E. MONTGOMERY, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and Lawrence W. Shilling and Robert E. Kushner, Assistant United States Attorneys, New York, N. Y., on the brief), *for defendants-appellees.*

LUMBARD, *Chief Judge*:

Plaintiffs brought this action in the Southern District of New York for a declaratory judgment that seven shipments of knives which they imported in early 1962 "and knives similar thereto" were not barred from entry into the United States by the Switchblade Knife Act, 72 Stat. 562 (1958), 15 U. S. C. §§ 1241-44. The knives, except for a few samples, were released to plaintiffs before customs inspection on entry bonds, and were then ordered by the individual defendants, the Collector and Deputy Collector of Customs of the Port of New York, to be redelivered on the ground that they violated the Switchblade Knife Act. Plaintiffs appeal from the dismissal of their complaint after a trial before Judge Croake and a jury, upon the jury's verdict that three knives from the shipments retained as samples by Customs and

offered in evidence by the defendants were switchblade knives within the meaning of the act. They also appeal from a judgment for the United States, which was added as a defendant on its own motion, on its counterclaim for liquidated damages under the entry bonds for failure to redeliver the knives, in the amounts of $7,468.80 against plaintiff Precise Imports Corporation, $10,000 against plaintiff Mitchell Mogal, Inc., and $3,810.98 against plaintiff Topline Industries Corporation, plus interest. By stipulation of the parties, this counterclaim was tried before Judge Croake without a jury.

Before filing their answer, defendants moved to dismiss the complaint on the ground that 28 U. S. C. § 1583 vests exclusive jurisdiction to review "decisions of any collector of customs . . . excluding any merchandise from entry or delivery, under any provision of the customs laws" in the Customs Court. The motion was denied by Judge Feinberg, 218 F. Supp. 494 (S. D. N. Y. 1963), and defendants have not renewed this contention upon appeal. This court must nevertheless determine whether it has jurisdiction of this case. E.g., *Mansfield, C. & L. M. Ry.* v. *Swan*, 111 U. S. 379 (1884); *Shahmoon Indus., Inc.* v. *Imperato*, 338 F. 2d 449 (3 Cir. 1964). We agree with Judge Feinberg that we do have jurisdiction, because the Switchblade Knife Act, which prohibits transportation and distribution of switchblade knives in interstate commerce and their knowing introduction into interstate commerce, 72 Stat. 562 (1958), 15 U. S. C. § 1242, is a criminal statute of general application, not a "provision of the customs laws." Cf. *Croton Watch Co., Inc.* v. *Laughlin*, 208 F. 2d 93 (2 Cir. 1953). Compare *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F. 2d 41 (2 Cir. 1939). We therefore proceed to the merits of plaintiff's appeal.

The Switchblade Knife Act defines a switchblade knife as "any knife having a blade which opens automatically —(1) by hand pressure applied to a button or other device in the handle of the knife, or (2) by operation of inertia, gravity, or both." 72 Stat. 562 (1958), 15 U. S. C. § 1241(b). At the jury trial of their action for a declaratory judgment and an injunction, plaintiffs read into the record a one-sentence pretrial stipulation of the parties that "the knives involved in this action do not open automatically by button, inertia, gravity, or any combination of the foregoing upon arrival at the Port of New York," and rested. The trial court denied defendants' motion for a directed verdict, and held that defendants had the burden of proving that the knives in issue violate the act.

Defendants then called Joseph Lamb, Assistant Deputy Commissioner for Technical Services in the Bureau of Customs, who testified that he had modified each of three sample knives from plaintiffs' shipments by filing down a rough corner on the heel of the blade and weakening the restraining spring slightly with an icepick, and demonstrated to the jury that the knives as modified opened with a flick of the wrist. Mr. Lamb stated that he had no special training in working with knives, and had worked from five to nine and one-half minutes on each knife. Defendants also called Louis A. Pinkussohn, an executive with an American manufacturer of knives, who expressed the opinion that the knives in evidence, which had stiletto blades from four and one-half to six and one-half inches long, were designed for use as daggers because their blades were sharp only at the point.

Judge Croake charged the jury, over plaintiffs' objection, that it must find that the knives violated the Switchblake Knife Act, despite the stipulation that they did not open automatically upon entry, if it found that they could

be made to open automatically by insignificant alterations *and* that one of the primary utilitarian purposes of their design and construction was for use as weapons. He also charged that in determining whether any alterations needed to make the knives open automatically were insignificant, the jury might consider the extent of the alterations, the time they took, and whether they required any special training or equipment or impaired the general usefulness of the knives. Finally, Judge Croake told the jury that in deciding whether use as weapons was one of the primary purposes of the knives' design, it might consider whether their design suited them primarily for use as weapons, whether they had any use other than as weapons which could not be served as well or better by other forms of knives,[1] whether any characteristics of the knives which increased their suitability as weapons were not required for any other use, and whether any characteristics which made it possible to make the knives open automatically somehow set them apart from other pocket knives not involved in this case. The jury returned a verdict that the knives in evidence were switchblade knives.

We approve Judge Croake's charge, except for the suggestion that the jury consider whether any characteristics which made it possible to alter the knives in evidence to open automatically somehow distinguished them from other pocket knives, the relevance of which is not apparent to us.[2] The report of the Senate Committee on Interstate and Foreign Commerce which recommended passage of the Switchblade Knife Act stated that the enforcement of state

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[1] We are sure that the jury understood this portion of the charge, as we do, as suggesting that it inquire whether any use of the knives other than as weapons could be served as well or better by other knives.

[2] Since this suggestion clearly favored plaintiffs, who suggested in their summation that many, if not all, pocket knives can be altered so as to open automatically, we find in it no basis for reversal.

laws banning switchblade knives would be extremely difficult as long as such knives could be freely obtained in interstate commerce, and added:

> "In supporting enactment of this measure, however, your committee considers that the purpose to be achieved goes beyond merely aiding States in local law enforcement. The switchblade knife is, by design and use, almost exclusively the weapon of the thug and the delinquent. Such knives are not particularly adapted to the requirements of the hunter or fisherman, and sportsmen generally do not employ them. It was testified that, practically speaking, there is no legitimate use for the switchblade to which a conventional sheath or jackknife is not better suited. This being the case, your committee believes that it is in the national interest that these articles be banned from interstate commerce." S. Rep. No. 1980, 85th Cong., 2d Sess., reprinted in 2 U. S. Code Cong. & Ad. News 1958, at 3435-37.

The congressional purpose of aiding the enforcement of state laws against switchblade knives and of barring them from interstate commerce could be easily frustrated if knives which can be quickly and easily made into switchblade knives, and one of whose primary uses is as weapons, could be freely shipped in interstate commerce and converted into switchblade knives upon arrival at the state of destination. We decline to construe the act as permitting such facile evasion.

We recognize that penal statutes are to be strictly construed, so as to give fair warning of the acts they prohibit. E.g., *McBoyle* v. *United States*, 283 U. S. 25 (1931). However, the canon of strict construction does not require that

a penal statute be emasculated in disregard of the clear intent of the legislature in enacting it. See, e.g., *United States* v. *Hood*, 343 U. S. 148 (1952); *United States* v. *Giles*, 300 U. S. 41 (1937). This is especially true where the statute, although criminal, is first construed in a civil action. Cf., e.g., *Johnson* v. *Southern Pac. Co.*, 196 U. S. 1, 17-18 (1904). Moreover, the requirement in the charge we have approved that the jury must find that one of the primary purposes of a knife is for use as a weapon not only gives effect to the congressional intent to bar from interstate commerce knives which are well adapted only to use as weapons, but also ensures that the nature of a knife which is found under this standard to violate the act will give fair warning that it is a switchblade knife within the meaning of the act. We hold, therefore, that a knife may be found to be a switchblade knife within the meaning of the Switchblade Knife Act if it it found that it can be made to open automatically by hand pressure, inertia, or gravity after insignificant alterations, and that one of its primary purposes is for use as a weapon.[3]

Plaintiffs argue that they should have been granted a declaratory judgment aganst defendants, notwithstanding the jury's verdict, because defendants did not connect the knives presented in evidence with the shipments in issue, and because there was no proof that the other sample knives retained or the other knives in the shipments were similar to those in evidence. All these contentions assume that defendants had the burden of producing evidence that

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[3] The Switchblade Knife Act was given a similar construction in *Goldman* v. *Angle*, No. 4815— Civil-J, S. D. Fla., Dec. 12, 1961.

Analogously, a firearm which lacks a firing pin but which can be fired with a small nail in place of the pin has been held to be within the National Firearms Act, Int. Rev. Code of 1954, § 5848(1). *United States* v. *Cosey*, 244 F. Supp. 100 (E. D. La. 1965). Contra, *United States* v. *Thompson*, 202 F. Supp. 503 (N. D. Cal. 1962). Compare Model Penal Code § 5.06(2) and Commentary (Ten. Draft No. 13, 1961).

the knives in the shipments were prohibited by the act. It is not clear that this assumption is correct.[4] But even assuming that defendants bore the burden of production, plaintiffs' contention that it was not met lacks merit. After the three knives were introduced, plaintiffs were asked to stipulate that they came from the shipments in issue. Plaintiffs' counsel replied that two of them, "in their original pre-worked-on condition, and when they were lawful, were imported by the defendant [sic] Mitchell Mogal." He stated that no one in the courtroom could identify the other knife, and it was received on the representation of the Assistant United States Attorney that it could be proved that it came from one of the shipments in issue.

As to the two knives concededly imported by plaintiff Michell Mogal, Inc., plaintiffs contend that it was not stipulated that they were imported in one of the shipments in issue. In light of defendants' clear request for a respon-

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[4] The record indicates that defendants intended only to bar entry of the knives into the United States, while permitting their reexport abroad; if so, the burden of persuasion in an action seeking to compel admission of the knives may be upon the importer. It has apparently been assumed that an importer seeking admission of merchandise which has been denied entry on the ground that it infringes a registered trademark, see 60 Stat. 440 (1946), 15 U. S. C. § 1124, has the burden of persuasion. See, *e.g.*, *Croton Watch Co., Inc.* v. *Laughlin*, 208 F. 2d 93 (2 Cir. 1953); *cf. Richard J. Spitz, Inc.* v. *Dill*, 140 F. Supp. 947 (S. D. N. Y. 1956). It might be contended, however, that such an action is in the nature of an action of replevin, see *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963) (dictum); *Slocum* v. *Mayberry*, 15 U. S. (2 Wheat.) 1, 9-13 (1817), and that in a replevin action the collector would have had to justify his retention of the merchandise. *Cf. Goldman* v. *American Dealers Serv., Inc.*, 135 F. 2d 398 (2 Cir. 1943) (dictum).

Even if the burden of persuasion as to the shipments before the court was upon the defendants, it is arguable that in a declaratory judgment action, even one for a declaration of non-liability, the plaintiff should bear the initial burden of producing evidence sufficient to justify a judgment in his favor. See, *e.g.*, *Preferred Acc. Ins. Co.* v. *Grasso*, 186 F. 2d 987, 991 (2 Cir. 1951) (dictum); Developments in the Law—Declaratory Judgments—1941-1949, 62 Harv. L. Rev. 787, 837 (1949).

sive stipulation, however, we cannot accept this strained construction of the response of plaintiffs' counsel.

As to the third knife, and as to plaintiffs' contention that it was not shown that the knives introduced in evidence were representative of those released to them, it is sufficient to observe that plaintiffs did not seek the production of any other sample knives retained by defendants, and that defendants' inability to produce any of the knives released to plaintiffs was due to plaintiffs' own refusal to redeliver them on demand, as required by the entry bonds. In fact, defendants sought at the trial to have plaintiffs directed to produce some of the knives released to them, and plaintiffs' counsel opposed the application, stating that "we haven't got all these knives" and that "I don't even know what knives, if any, can be produced." We think that plaintiffs should have been directed to produce the knives, or to stipulate that the knives in evidence were representative. In any case, plaintiffs should obviously not be allowed to profit by defendants' inability to produce the knives which had been released to the plaintiffs and which they bound themselves to redeliver and failed to redeliver. If, therefore, the third knife should have been more fully connected, which we do not decide, or the knives released were not shown to be similar to those in evidence, the corresponding portions of plaintiffs' complaint should have been dismissed, and the court's failure to do so certainly did not prejudice plaintiffs. We therefore affirm the dismissal of plaintiffs' complaint upon the jury's verdict.[5]

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[5] Plaintiffs contend that Mr. Pinkussohn should not have been allowed to testify, as he was not named in the pretrial order, and that his testimony as to the uses of the knives was irrelevant and inflammatory. But plaintiffs did not seek a continuance to meet Mr. Pinkussohn's testimony, or indicate how they were prejudiced by it. It is clear that his testimony on the uses of the knives was relevant to the issue whether they were switchblade knives.

The judgment for the United States on its counterclaim for liquidated damages under the entry bonds was proper, whether or not the knives were barred by the Switchblade Knife Act. One of the conditions of the entry bonds, which were on Customs Form 7551, was that the importer should

> "redeliver or cause to be redelivered to the order of the collector of customs, on demand by him, in accordance with the law and regulations in effect on the date of the release of said articles, any and all merchandise found not to comply with the law and regulations governing its admission into the commerce of the United States,"

unless a superseding bond had been filed. Plaintiffs failed to return on demand any of the knives released to them under the bonds, and have not disputed the amounts of liquidated damages, fixed by 19 C. F. R. § 25.17(d) as the value of the knives on entry and the estimated duties and taxes on them.

Although the language of the bonds is not wholly free of ambiguity, we have concluded that plaintiffs were therefore liable to pay the liquidated damages whether or not defendants' determination that the knives violated the Switchblade Knife Act was finally upheld. Cf. *United States* v. *Dieckerhoff*, 202 U. S. 302, 310-12 (1906); *United States* v. *Daniel F. Young, Inc.*, 46 F. Supp. 373 (S. D. N. Y. 1942), aff'd *per curiam*, 134 F. 2d 413 (2 Cir. 1943). The Bureau of Customs is mandated by 46 Stat. 728 (1930), as amended, 19 U. S. C. § 1499, not to release imported merchandise which is required to be inspected before inspecting it "except under . . . bond or other security . . . to assure compliance with all applicable laws, regulations, and instructions . . ." In accordance with this mandate, the clear purpose of the entry bonds is to place Customs,

if it demands the return of goods released under the bonds, in as good a position as if it had not released them. Cf. *United States* v. *Huber*, 41 C. C. P. A. (Customs) 69, 72-73 (1953). This purpose would be frustrated if plaintiffs were held to be liable under the bonds for failure to redeliver the knives only if the knives were finally held to violate the Switchblade Knife Act.[6]

Affirmed.

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[6] Plaintiffs contend that the counterclaim was based not upon the entry bonds but upon 46 Stat. 734 (1930), 19 U. S. C. § 1514, as it alleged that no timely protest of defendants' demands for liquidated damages had been made and that "the said amounts are now conclusively due and owing, pursuant to" 19 U. S. C. § 1514. That section, however, creates no cause of action; it merely provides that certain decisions of the Customs shall be final if not protested within sixty days. Moreover, the counterclaim referred specifically to defendants' demands, copies of which were attached as exhibits to plaintiffs' complaint, for liquidated damages under the entry bonds. Thus plaintiffs were apprised of the basis of the counterclaim, as is underscored by the fact that their reply to the counterclaim pleaded as a defense that the sureties on the entry bonds were indispensable parties. (The sureties were notified of the trial of the counterclaim, and stated that they did not wish to appear.)

Opinion of U. S. District Court

Memorandum Opinion

(196)

The instant litigation, which is of a nature not apparently often found in the District Court, concerns the importation of certain knives and the applicability of the Federal Switchblade Knife Act.[1*] The controversy arises from the determination by the defendants to exclude from the United States certain knives imported by the plaintiffs upon the basis that they are "switchblade knives" within the meaning of 15 U.S.C. §§ 1241 and 2. Pursuant to this ruling, demand was made by the Collector that the knives which had already been imported and received by the plaintiffs be redelivered to him. There was no compliance with the demand and accordingly (197) the Collector demanded liquidated damages against bonds which had been posted by the plaintiffs. The action has been brought by the plaintiffs for a declaratory judgment to determine the legality of the importation of the knives and for an injunction against the enforcement by the defendant Kelly of his determination that the importation of the knives is prohibited by the statute. The United States has counterclaimed for liquidated damages for the failure of the plaintiffs to redeliver the knives upon demand therefor. The Government demanded a jury and also stipulated that:

> "The knives involved in this action do not open automatically by button, inertia, gravity, or any combination of the foregoing, upon arrival at the Port of New York."

Motions were filed by the defendants to dismiss the complaint upon the ground that subject matter jurisdiction was lacking by reason of the vesting by 28 U.S.C. § 1583[2] of "exclusive jurisdiction" in the Customs Court, and

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* Footnotes annexed at end of this memorandum.

by the plaintiffs for summary judgment upon the basis that the statute in question applies by its terms only to commerce among the states and not to shipments from foreign countries into the United States. Both applications were denied.[3]

(198) The action thereafter came on before the undersigned in the Civil Jury Part of the court, and notwithstanding its nature, the Government had requested a jury. Accordingly, it was determined that the actions of the plaintiffs would be tried to a jury and the counterclaim subsequently tried to the court. The trial before the undersigned and a jury was held on October 7 and 8, 1965. The jury found that the Government had sustained its burden[4] and responded in the affirmative to the following interrogatory put to them by the court:

> "Do the knives in question, that is, the knives put in evidence by the government open automatically by operation of inertia, gravity or both, within the meaning of the statute?"

Thereafter, a conference dealing with the remaining issues to be tried was held in Chambers on October 14, 1965, at which all counsel appeared.

Those issues, as indicated in the pretrial order, and discussions thereon, are as follows:

> "a. Whether the importation of the subject knives, or knives similar thereto, prior to leaving the custody of the customs authorities, is interstate commerce within the context of 15 U.S.C. 1241, et seq."

This, of course, was already determined by Judge Feinberg.

> (199) "b. Whether the subject knives can be altered to become switchblade, inertia, or gravity knives."

"c. Assuming such knives, or similar knives, can be so altered, whether they are, therefore, excludable."

The finding of the jury is, of course, dispositive of "b" and also of "c" since the jury was charged as to the statutory purpose.

"d. Whether, upon leaving the possession of the plaintiffs or the defendants in their original state, the customs service retains jurisdiction."

"e. Whether the defendants' demand for redelivery, after the subject knives leave the possession of the plaintiffs, is effective."

Any contentions by the plaintiffs under these headings are clearly without merit. The obligation of the bonds to redeliver upon a determination of the Collector that the knives might not be admitted into the United States and the making of a proper demand was absolute.[5]

"f. Whether the service of the complaint and the exhibits annexed thereto, in this action, upon the defendants, made it unnecessary to file written protests pursuant to Section 1514, Title 19, U.S.C.[(6)]"

"g. Whether service of the complaint and exhibits in this action upon the defendants was compliance with Section 1514, Title 19, U.S.C."

(200) The Assistant United States Attorney states, at p. 5 of his post-trial memorandum, that:

"The reference to 19 U.S.C. § 1514 in paragraph 12 of the counterclaim was to support the allegation that plaintiffs had lost their right to contest the claim for liquidated damages by their failure to file a protest under 19 U.S.C. § 1514. This contention is not being pressed at this time."[7]

"h. Whether the defendants are entitled to liquidated damages."

This, of course, is the question for determination upon trial of the counterclaim and will be disposed of below.

"i. Whether the sureties on plaintiffs' bonds are indispensable parties on defendants' claim for liquidated damages thereunder."

It would seem that the sureties are not indispensable, but that the issue as to whether they should be brought into this action is not thereby closed.

The bonds provide for a joint and several liability. "If liability on a bond is joint and several, all who are liable may be joined or one or more may be sued at the option of the plaintiff." 2 Barron & Holtzoff, *Federal Practice & Procedure,* § 512 at p. 104. Moreover, a judgment against a principal is not ordinarily binding on his surety. *Kramer* v. *Morgan,* 85 F. 2d 96 (2d Cir. 1936).

(201) However, as to the question of whether they should be brought in:

Rule 13(h), Fed. R. Civ. P., provides that:

"When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counter-claim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained, and the joinder will not deprive the court of jurisdiction of the action."

In *Value Line Fund* v. *Marcus,* 161 F. Supp. 533 (S.D.N.Y. 1958), the court held that:

"The condition of Rule 13(h)—that the additional party be 'required for the granting of complete relief

> in the determination of a counterclaim'—should be construed liberally. 'Required' need not mean only 'indispensable' or 'necessary.' 'Required' may properly be interpreted, in the context of Rule 13(h), to mean 'appropriate' or 'interested.' That interpretation accords with the basic canon of construction of the Federal Rules of Civil Procedure, Rule 1: 'They [the rules] shall be construed to secure the just, speedy, and inexpensive determination of every action.'" 161 F. Supp. at 536.

Though *Value Line* is factually distinguishable from the instant case, the reasoning is persuasive. In accord therewith and perhaps closer on point to the present situation, is *United States* v. *Long*, 15 F.R.D. 23 (D. Vt. 1953). *Long* was a breach of contract action in which the defendant (202) counterclaimed for breach and the court granted an ex parte motion of the defendant pursuant to Rules 13(a) and (h) that the surety of the plaintiff be brought into the case as a party defendant. The surety moved to vacate the order bringing it in and to strike the complaint, which motion was denied. In so ruling, the court stated that:

> "If the Indemnity Company is in fact a surety of Pierce, it is liable jointly and severally with Pierce to the city—if liability be found in fact. As such, its presence in this action is required for complete relief. . . .
>
> "It is at once clear that if the . . . [surety] is not joined in this action, it will not be bound by the decision therein. Assuming that the alleged suretyship . . . is proven, a recovery against the . . . [plaintiff] in this action could only lead to an analogous action against . . . [the surety] if the latter is not herein joined. Such would be an unreasonable duplication of effort and a needless retrial of issues; it would be out

of tune with the spirit of the Federal Rules of Civil Procedure." [8]

In light of these considerations, it was suggested that the Surety Companies be apprised of the situation and granted an opportunity to come into the action, if they were so disposed. Under letters of October 15, 1965, the Assistant United States Attorney so notified both the (203) Seaboard Surety Company, and the St. Paul Mercury Insurance Co.[9] Seaboard, under date of October 19, and St. Paul, under date of October 26, 1965, both replied that they do not wish to appear.[10]

The response to issue "j" in the pretrial order, "whether this Court has jurisdiction of this action," is of course affirmative, so also issue "k," "Whether this Court has jurisdiction of the counterclaim" is disposed of in the affirmative below in the findings and conclusions upon the trial of the counterclaim.

As indicated, trial of the counterclaim was held before the undersigned on November 8, and proposed findings, conclusions and memoranda were submitted on December 15. The court has examined with care the latter, as well as the record in this case and, after consideration, makes the following: [11]

Findings of Fact

1) The Collector of Customs determined that the knives covered by the bonds in question could not properly be admitted into the United States.

2) Proper demand for redelivery of the knives was made.

3) Plaintiffs did not redeliver the knives.

(204) CONCLUSIONS OF LAW

1) This court has jurisdiction of the counterclaim. 28 U.S.C. § 1345.

2) The counterclaim is based upon a breach of the bonds posted by the plaintiffs or their agents.

3) Maintenance of the counterclaim is not dependent upon a demonstration that the knives in fact did violate the Federal Switchblade Knife Act. See *United States* v. *Young*, 46 F. Supp. 373 (S.D.N.Y. 1942), *aff'd per curiam on opinion below*, 134 F. 2d 413 (2d Cir. 1943).

4) The defendants have established the elements necessary to recovery upon their counterclaim.

5) The defendants are entitled to judgment in their favor dismissing the complaint and in their favor upon their counterclaim against Precise Imports Corp., Mitchell Mogal, Inc.,[12] and Topline Industries Corp., in the amounts sought, together with interest, costs and disbursements.

Counsel shall settle a judgment accordingly.

Dated: New York, N. Y.
March 31, 1966

THOMAS F. CROAKE
U. S. D. J.

(205)

FOOTNOTES

[1] 15 U.S.C. § 1241 provides that:

"As used in this chapter—

(a) The term 'interstate commerce' means commerce between any State, Territory, possession of the United States, or the District of Columbia, and any place outside thereof.

(b) The term 'switchblade knife' means any knife having a blade which opens automatically—

(1) by hand pressure applied to a button or other device in the handle of the knife, or

(2) by operation of inertia, gravity, or both."

Under § 1242 of Title 15,

"Whoever knowingly introduces, or manufactures for introduction into interstate commerce, or transports or distributes in interstate commerce, any switchblade knife, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

§§ 1243 and 4 are not material to the present case.

[2] "The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury; decisions excluding any merchandise from entry or delivery, under any provision of the customs laws; and the liquidation or reliquidation of any entry, or the refusal to pay any claim for drawback or to reliquidate an entry for a clerical error as provided by the customs laws."

[3] *Precise Imports Corp.* v. *Kelly*, 218 F. Supp. 494 (S.D.N.Y. 1963). As to the motion by the Collector, the Hon. Wilfred Feinberg, then District Judge, held that under the authority in this Circuit, the statute involved herein, 15 U.S.C. §§ 1241 and 2 is not a provision "of the customs laws", and noted that the provision "is essentially a criminal statute."

[4] On October 7, 1965, the following memorandum was sent by the court to counsel:

"In the light of the unusual nature of this action, and of the demand by the defendant for a jury to perform what is in substance the construction of a statute, the court is taking the opportunity afforded by the adjournment of this afternoon to send the following memorandum.

"Requests to charge No. 5, submitted by the plaintiffs is as follows:

'That the government has the burden of proving that each of the knives involved is in violation of the statute.'

"Though the Government in its memorandum states that the burden of proof is upon the plaintiffs, it does not appear that the Government has submitted a request upon this issue.

"After independent research into the question, the court is of the opinion that the position of the plaintiffs is valid. Since the statute is 'essentially a criminal statute', the court has grave doubts as to the propriety of compelling the plaintiffs to assume the burden of proving that their knives are not within the category which is the subject of the offense described in 15 U.S.C. § 1242. This would seem to be analogous to compelling a defendant in a criminal action to prove his innocence, a procedure which is foreign to our system of jurisprudence. Moreover, the peculiar nature of the action, that is, one for a declaration of non-liability, would warrant the shifting of the burden of proof to the defendants, the parties who initiated the occurrences which are the bases for said declaration. The situation is not unlike that in patent infringement actions wherein the claim of infringement is the basis of an action for a declaration of non-liability.

"Accordingly, counsel are advised that unless the Government can demonstrate the validity of a contrary conclusion, at the commencement of the proceedings on Friday the jury will (207) be instructed that in contrast to the situation ordinarily existent, the risk of non-persuasion is upon the defendants. This will be done to insure that the evidence will be viewed in the proper light. . . ."

No such demonstration was made and the jury was so instructed. Of course, the Government also has the burden of proof upon its counterclaim.

[5] As to the matter of disposal by the plaintiffs of any knives prior to the demand for redelivery, the Assistant United States Attorney notes that, assuming such disposal was made, it would at most be "an equitable consideration which could be addressed to the discretion of the Secretary of the Treasury in a petition for remission of the penalty. See 19 U.S.C. § 1618."

[6] That section provides in substance that unless within 60 days after certain decisions of the Collector, the party concerned files "a protest in writing with the Collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision or refusal, the reasons for the objection thereto", such decisions shall "be final and conclusive upon all persons."

[7] In any event, under the decision of Judge Feinberg that the switchblade knife act provisions are not of the customs laws, this question would seem moot since the relevant language of § 1514 deals with "decisions excluding any merchandise from entry or delivery under any provision of the customs laws."

[8] See also *Delia Plastering Company* v. *D. H. Dave, Inc.*, 11 F.R.D. 304 (N. D. Ohio 1951), and Rule 21, Fed. R. Civ. P. Under the Rule, "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." In *Delia Plastering*, the court stated that:

> (208) "By the terms of the bond, Maryland Casualty Company is liable jointly and severally with the plaintiff. Whether it is a necessary or an indispensable party who must be present in the controversy under Rule 13(h) need not be resolved as it is manifestly a proper party within Rule 20 and may be added by the Court in accordance with Rule 21."

[9] Those letters state, *inter alia*, that:

> "On October 14, 1965, a conference was held in Judge Croake's chambers, attended by Messrs. King and Rosof for the plaintiffs and myself for the defendants, at which Judge Croake set the trial of the counterclaim down for November 8, 1965. At this conference it was also agreed that you should be notified of the trial date and that you should have an opportunity to appear and defend your interests.
>
> "If you desire to appear and defend your interests, please let me know as soon as possible. If I do not hear from you by November 1, 1965, I will assume that you do not desire to be

represented at the trial of the counterclaim, and will so advise the Court and plaintiffs' attorneys.

"I am available at your convenience to discuss the case and to show you any relevant papers."

[10] These letters were received in evidence at the trial of the counterclaim as defendant's exhibits "AL" and "AM."

[11] The Assistant United States Attorney has submitted rather detailed proposed findings. However, in view of the nature of the issues, the Court is not disposed to further lengthen the instant opinion by like detail. Accordingly, the findings and conclusions here made shall be restricted to the few essential factors remaining. As to the post-trial papers submitted on behalf of the plaintiffs, to the extent that they raise additional issues not expressly disposed of, such contentions, to the extent that they are contrary with the instant opinion, are found unpersuasive and are rejected. (209)

[12] The sum of $10,216.93 had been demanded from Mitchell Mogal, Inc. However, in their post-trial papers, defendants note the face amount of Mogal's bond to be $10,000 and claim only that amount.